

# Winding-up based on local arbitration awards: Is leave to enforce required?

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## Introduction

It is well-established that a local arbitration award is enforceable in the same manner as a judgment of the court that has the same effect, but only with the leave of the court: s.84(1), Arbitration Ordinance (Cap.609). This procedural requirement of obtaining leave is generally to be observed.

But can a winning party “enforce” (in its non technical meaning ) a local arbitration award by issuing a statutory demand and a winding-up petition against the losing party based on the awarded sum. Is leave to enforce under s.84 required?

## The decision of Lucky Resources

Harris J answered the question in the negative in *Re Lucky Resources (HK) Limited* (HCCW 89/2016, 11 July 2016). In that case, the petitioning creditor obtained a Hong Kong arbitration award in its favour in the sum of US\$1,444,499.61 plus interest, and issued a statutory demand and a winding-up petition against the Respondent Company. No leave to enforce the Hong Kong award had been obtained. The Respondent Company argued that the petition was therefore defective.

This argument was rejected by Harris J. Most importantly, Harris J re-iterated the well-established proposition that the presentation of a winding-up petition does not constitute enforcement of the award. In contrast, winding-up based on a company’s inability to pay its debt has always been regarded as a “class remedy”. This is because winding-up is for the benefit of the creditors as a whole. This is also reflected by the fact that, upon the making of the winding-up the order, the petitioner would not have its debt immediately paid.

In so holding, Harris J applied the decisions of *In Re International Tin Council* [1989] Ch 309; *In Re International Tin Council* [1987] Ch 419 and *Pacific King Shipping Pte Ltd v Glory Wealth Shipping Pte Ltd* [2010] SGHC 173; as well as *Re Ghelani Impex Ltd* [1975] EA 197. These cases demonstrate that winding-up proceedings are not “enforcement” of a judgment or Hong Kong arbitration award.

## Conclusion and observation

The decision of *Re Lucky Resources (HK) Limited Clarified* this specific point of law, and is to be welcomed.

In light of Harris J's decision, the winding-up process should not be regarded as "enforcement" of a judgment or Hong Kong arbitration award. This has significant procedural implications. As explained by *Re Lucky Resources (HK) Limited*, no leave to "enforce" a local award is required. In addition, the "non-enforcement" nature of the winding-up process also affects other applications, such as an application to serve out of jurisdiction (see *In Re Grand China Logistics Holding (Group) Co., Ltd*) and an application for a stay of execution pending appeal (since the stay may not affect the commencement of the winding-up process).

Practitioners should therefore bear the "class remedy" nature of the winding-up process in mind.